

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

RETRO ENVIRONMENTAL, INC./

GREEN JOBWORKS, LLC.

Joint Employer

and

**CONSTRUCTION AND MASTER LABORERS'
LOCAL 11, A/W LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA (LIUNA)**

Petitioner

Case 05-RC-153468

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of all full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by the joint employer Retro Environmental, Inc. (Retro) and Green JobWorks, LLC (Green JobWorks), excluding office clericals, confidential and management employees, guards and supervisors as defined in the National Labor Relations Act.¹ On June 26, 2015, I dismissed the petition on the grounds that Retro and Green JobWorks met their burden of establishing an imminent cessation of operations for the petitioned-for unit employees, relying on *Davey McKee Corp.*, 308 NLRB 839 (1992). On August 16, 2016, the Board reversed my finding of an imminent cessation, reinstated the petition, and remanded the matter to me “for further appropriate action.” 364 NLRB No. 70, slip op. at 5 (Aug. 16, 2016). In doing so, the Board also concluded that Retro and Green JobWorks are joint employers of the petitioned-for unit, contrary to the positions advanced by each entity prior to the hearing.

Accepting the remand of the Board and its conclusions that the Petitioner met its burden of establishing that Retro and Green JobWorks are joint employers of the petitioned-for unit employees,² as well as that the joint employers did not meet their burden of establishing an

¹ The parties stipulated, and I previously found that the Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (Act).

² The parties stipulated, and I previously found that that Green JobWorks, a limited liability company with an office and place of business in Baltimore, Maryland, is a temporary staffing agency engaged in the business of demolition and environmental remediation, including asbestos remediation. In conducting its operations during the twelve months prior to the hearing, Green JobWorks performed services valued in excess of \$50,000 in states other than the State of Maryland. The parties further stipulated, and I previously found that Green JobWorks is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.

imminent cessation of operations warranting the dismissal of the petition, I am still tasked with determining whether there is a question concerning representation under the National Labor Relations Act,³ and, if there is, what is the appropriate method and means to conduct an election.

The parties stipulated at the hearing that if I were to conduct an election, a unit including all full-time and regular part-time laborers, including demolition and asbestos workers, excluding office clericals, confidential and management employees, guards and supervisors as defined in the National Labor Relations Act is an appropriate unit, and I previously found that the petitioned-for employees share a community of interest. In line with the Board's finding that Retro and Green JobWorks are joint employers of the petitioned-for unit employees, I find that the petitioned-for unit is an appropriate unit.

I also find that, for eligibility purposes, it is most appropriate to use the *Daniel/Steiny* formula for employees working in the construction industry. As described in greater detail in my prior decision and the Board's decision, both Retro and Green JobWorks are involved in the construction industry. Green JobWorks is a temporary staffing agency engaged in the business of providing temporary labor to various construction companies, providing demolition and asbestos abatement laborers to approximately 15 to 20 client construction companies, including Retro. For its part, Retro is a construction company engaged in the business of providing demolition and asbestos abatement services to private and government entities. The construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), and *Steiny & Co.*, 308 NLRB 1323 (1992) applies to all employees in the construction industry.⁴ In *Steiny*, the Board held that the construction industry eligibility formula applies to all construction industry elections unless the parties stipulate not to use it. *Steiny*, supra at 1327-28 and fn. 16. Here, it is undisputed that Retro and Green JobWorks operate in the construction industry. Further, the parties have not stipulated to waive the *Daniel/Steiny* formula. Accordingly, I find that the *Daniel/Steiny* formula is applicable to this case.

I have also determined that a mail ballot election will be held. Mail balloting may be used in certain circumstances, such as where the eligible voters are scattered because of their

The parties also stipulated, and I previously found that Retro, a corporation with an office and a place of business in Sykesville, Maryland, is engaged in the business of providing demolition and environmental services to private and governmental entities, including at sites in Washington D.C. In conducting its operations during the twelve months prior to the hearing, Retro performed services valued in excess of \$50,000 in States other than the State of Maryland. The parties further stipulated, and I previously found that Retro is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act.

³ Neither Retro nor Green JobWorks sought Board review of my prior findings that Retro and Green JobWorks did not meet their burdens of establishing that the petition should be dismissed because the petitioned-for unit employees are temporary, nor did they meet their burdens of establishing that the petition should be dismissed as premature because of a lack of a substantial and representative complement of employees in the petitioned-for unit.

⁴ At hearing, the Employer made an offer of proof that the *Daniel/Steiny* formula should not apply in this case. Following the receipt of the offer of proof, I reviewed it to determine if the offer was sufficient to sustain the Employer's position, which is that the formula is arbitrary and capricious and should be overruled, and that, if given the opportunity, the Employer would rebut the presumption of eligibility for such employees qualifying for eligibility under the formula. I rejected the Employer's offer of proof at hearing, and I adhere to my conclusion.

duties or work schedules. In such situations, I may conduct an election by mail ballot, taking into consideration the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). At the hearing in June 2015, all parties expressed a preference to conduct a manual election at the job site in question. However, in light of the cessation of that particular job and subsequent to the Board's decision, the parties were solicited their position on election details. The Petitioner requested that the election be conducted by mail ballot. Green JobWorks consented to a mail ballot if I were to provide them additional time to prepare the voter list. Significantly, no party has argued for a manual election. Given the parties' positions, plus the fact that there are an presently-unknown number of employees eligible to vote under the *Daniel/Steiny* formula and taking into account the efficient use of Board personnel, I find a mail ballot will best allow the unit employees the ability to exercise their right to vote in the election.

I. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. Retro Environmental, Inc. is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction therein.
3. Green JobWorks, LLC is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction therein.
4. Retro Environmental, Inc. and Green JobWorks, LLC are joint employers within the meaning of the Act of the employees in the petitioned-for unit.
5. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Employer, and the Employer declines to recognize the Petitioner.
6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
7. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by Retro Environmental, Inc. and Green JobWorks, LLC, excluding office clericals, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

II. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election by mail among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA).

A. Election Details

As described above, the election will be held by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 5, Bank of America Center, Tower II, 100 S. Charles Street, Ste. 600, Baltimore, MD 21201, on September 30, 2016 at 3:00 p.m.⁵ Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will automatically be void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the National Labor Relations Board by calling the Baltimore Regional Office collect at (410) 962-2219 by no later than 4:45 p.m. on October 7, 2016 in order to arrange for another mail ballot kit to be sent to that employee.

The mail ballots will be counted at the Baltimore Regional Office of the National Labor Relations Board, Region 5 at 3:00 p.m. on October 21, 2016. In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office of the National Labor Relations Board, Region 5 prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date, or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

⁵ At hearing in June 2015, the Petitioner agreed to waive the 10-day period with the voter list. However, in light of the time that has passed since then, I am directing that ballots be mailed out to reflect a 10-day period with the list.

as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **TWO business days after the date of issuance**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-April-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

A. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

III. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: September 15, 2016

(SEAL)

/s/ Charles L. Posner

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